Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B–03–388 OF 1998
GOPAL SRI RAM, AHMAD FAIRUZ AND DENIS ONG JJCA
10 JUNE 2004

Land Law — Indefeasibility of title and interests — Subject land was trust property — Whether appellant bona fide purchaser for valuable consideration — National Land Code 1965 s 340

Land Law — Indefeasibility of title and interests — Whether National Land Code 1965 s 340 Code provides for deferred or immediate indefeasibility

The respondents were the children of the deceased. The appellant was the third defendant in the court below. There were three other defendants before the High Court but they were not appealing against the orders made by the High Court. The third defendant purchased the subject land from the deceased's son and the first defendant in the court below. The High Court found that the subject land was trust property, that the first defendant had obtained the issue document of title from the first respondent, that the first defendant had no interest in the subject land and that the appellant was not a bona fide purchaser. The High Court granted the respondents a declaration that the transfer to the appellant was null and void, set aside the transfer and made other consequential orders.

Held, dismissing the appeal:

(1) (per **Gopal Sri Ram JCA**) The first defendant had nothing and could therefore pass nothing to the appellant. The appellant may have obtained good title if he had been a *bona fide* purchaser of the subject land. But he was not a *bona fide* purchaser. The High Court was right in setting aside the transfer to the appellant (see para 3); *M&J Frozen Foods Sdn Bhd v Siland Sdn Bhd* [1994] 1 MLJ 294 followed.

(2) (per **Gopal Sri Ram JCA**) Section 340 of the National Land Code 1965 ('the Code') should be read as follows. The title of a registered proprietor is indefeasible and good against the whole world. But it is not indefeasible in cases where it has been obtained by fraud, forgery, by means of an insufficient or void instrument, or by the exercise of a power purportedly conferred by written law. If a title is acquired by any of these means, then the title of the acquirer is liable to be set aside in the hands of the acquirer and all those to whom he transfers the land except a *bona fide* purchaser for valuable consideration. However, the fact that the title of a registered proprietor is indefeasible does not prevent the land from being forfeited or sold under a statutory power. Neither does it prevent the title being defeated by operation of law (see para 11).

(3) (per **Gopal Sri Ram JCA**) It was on this basis that *M&J Frozen Foods Sdn Bhd v Siland Sdn Bhd*, citing *Gibbs v Messer* [1891] AC 248 as authority, that an acquirer who obtains his title by means of a void or voidable instrument obtains deferred indefeasibility. Accordingly, where title is acquired by means of a forged instrument of transfer, the title of the acquirer may be set aside in his hands even if he is a bona fide purchaser. However, the Federal Court in *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241, held that s 340 of the Code admitted immediate as opposed to deferred indefeasibility (see para 12).

(4) (per **Gopal Sri Ram JCA**) In *Young v Bristol Aeroplane Co Ltd* [1944] KB 718; [1946] AC 163 at p 729, it was held that where there are conflicting decisions of the Court of Appeal, the High Court is free to choose which it will follow. In the instant case, the Court of Appeal saw no difference in principle in relation to the Court of Appeal and the Federal Court (see para 15).

(5) (per **Gopal Sri Ram JCA**) The decision of the Federal Court in *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 24 was *per incuriam* and not good law as it overlooked the decision of the Supreme Court in *M & J Frozen Foods Sdn Bhd v Siland Sdn Bhd* and did have regard to s 5 of the Code on the difference between a 'proprietor' and a 'purchaser'. Our courts should no longer treat themselves bound by the Federal Court judgment in *Adorna Properties Sdn Bhd v Boonsom Boonyanit*. The courts must now proceed on the basis that the Code provides for deferred and not immediate indefeasibility (see para 21).

(6) (per **Ahmad Fairuz JCA**) Based on the doctrine of judicial precedent, the court has no choice but to accept and adhere to the decision of the Federal Court in the Adorna Properties case (see para 26). All courts whose jurisdiction is subordinate to that of Federal Court should follow Federal Court decisions until they are either reversed or replaced with another case law by the Federal Court (see para 27).

[**Bahasa Malaysia summary**

Responden-responden adalah anak-anak kepada si mati. Perayu adalah defendan ketiga di mahkamah bawahan. Terdapat tiga defendan lain di hadapan Mahkamah Tinggi tetapi mereka tidak merayu terhadap perintah-perintah yang dibuat oleh Mahkamah Tinggi. Defendan ketiga telah membeli tanah yang dipersoalkan daripada anak lelaki si mati dan defendan pertama di mahkamah bawahan. Mahkamah Tinggi mendapati bahawa tanah yang dipersoalkan merupakan hartanah amanah, bahawa defendan pertama telah memperolehi dokumen hak milik daftar daripada responden pertama, bahawa defendan pertama tiada kepentingan ke atas tanah yang dipersoalkan dan bahawa perayu bukan pembeli *bona fide*. Mahkamah Tinggi memberi responden-responden satu deklarasi bahawa

pemindahan kepada perayu adalah terbatal dan tidak sah, mengetepikan pemindahan itu dan membuat perintah lain. A

Diputuskan, menolak rayuan tersebut:

(1) (oleh **Gopal Sri Ram HMR**) Defendan pertama tiada apa-apa dan oleh itu tidak memindahkan apa-apa kepada perayu. Perayu mungkin telah memperoleh hak milik baik jika beliau seorang pembeli bona fide tanah yang dipersoalkan itu. Namun beliau bukan pembeli *bona fide*. Mahkamah Tinggi adalah betul dengan mengetepikan pemindahan kepada perayu (lihat perenggan 3); *M&J Frozen Foods Sdn Bhd v Siland Sdn Bhd* [1994] 1 MLJ 294 diikut. B C

(2) (oleh **Gopal Sri Ram HMR**) Seksyen 340 Kanun Tanah Negara 1965 ('Kanun tersebut') hendaklah dibaca sedemikian. Hak milik tuan punya berdaftar adalah tidak boleh dipersoalkan oleh sesiapa pun dan sah terhadap seluruh dunia. Namun ia tidak boleh disangkal dalam kes-kes di mana ia diperoleh melalui penipuan, pemalsuan, dengan cara penggunaan alat yang tidak memadai atau tidak sah, atau melalui penggunaan kuasa bagi tujuan yang diberikan oleh undang-undang bertulis. Jika hak milik diperoleh melalui mana-mana berikut, maka hak milik pemeroleh boleh diketepikan dalam tangan pemeroleh dan semua yang beliau pindahkan dalam tanah tersebut kecuali kepada pembeli bona fide untuk balasan bernilai. Bagaimanapun, hakikat bahawa hak milik tuanpunya berdaftar tidak boleh disangkal tidak menghalang tanah tersebut daripada dirampas atau dijual di bawah kuasa statutori. Ia juga tidak menghalang hak milik itu dicabar oleh pelaksanaan undang-undang (lihat perenggan 11). D E F

(3) (oleh **Gopal Sri Ram HMR**) Berdasarkan ini *M&J Frozen Foods Sdn Bhd v Siland Sdn Bhd*, memetik *Gibbs v Messer* [1891] AC 248 adalah autoriti bahawa seorang pemeroleh yang mendapat hak milik beliau melalui alat yang tidak sah atau boleh batal memperolehi 'deferred indefeasibility'. Oleh demikian, di mana hak milik didapati dengan cara memalsukan pemindahan, hak milik pemeroleh boleh diketepikan meskipun beliau adalah pembeli bona fide. Namun begitu, Mahkamah Persekutuan dalam *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241 memutuskan bahawa s 340 Kanun tersebut meluluskan 'immediate' dan bukannya 'deferred indefeasibility' (lihat perenggan 12). G H

(4) (oleh **Gopal Sri Ram HMR**) Dalam *Young v Bristol Aeroplane Co Ltd* [1944] KB 718; [1946] AC 163 di ms 729, ia diputuskan bahawa di mana terdapat keputusan-keputusan Mahkamah Rayuan yang bercanggah, Mahkamah Tinggi bebas untuk memlilih mana yang perlu diikut. Dalam kes semasa, Mahkamah Rayuan tidak melihat apa-apa perbezaan dalam prinsip berkaitan Mahkamah Rayuan dan Mahkamah Persekutuan (lihat perenggan 15). I

(5) (oleh **Gopal Sri Ram HMR**) Keputusan Mahkamah Persekutuan dalam *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 24 adalah *per incuriam* dan bukan undang-undang kerana ia terlepas perhatian keputusan Mahkamah Agong dalam *M & J Frozen Foods Sdn Bhd v Siland Sdn Bhd* dan yang berkaitan dengan s 5 Kanun tersebut tentang perbezaan antara seorang 'proprietor' dan seorang 'purchaser'. Mahkamah di sini menganggap tidak terikat dengan penghakiman Mahkamah Persekutuan dalam *Adorna Properties Sdn Bhd v Boonsom Boonyanit*. Mahkamah di sini kini hendaklah bertindak berdasarkan Kanun tersebut yang memperuntukkan deferred dan bukan immediate indefeasibility (lihat perenggan 21).]

(6) (oleh **Ahmad Fairuz HMR**) Berasaskan prinsip duluan kehakiman mengikat (judicial precedent), mahkamah ini tidak mempunyai pilihan kecuali menerima dan mematuhi keputusan Mahkamah Persekutuan didalam kes *Adorna Properties* (lihat perenggan 26). Semua mahkamah yang bidang kuasanya lebih rendah dari Mahkamah Persekutuan hendaklah mematuhi kes Mahkamah Persekutuan sehingga ianya ditolak atau digantikan dengan kes perundangan yang lain dari Mahkamah Persekutuan (lihat perenggan 27).]

Notes

For cases on indefeasibility of title and interest generally, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2364–2731.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit [2001] 1 MLJ 241 (refd)
Cassell & Co Ltd v Broome & Anor [1972] AC 1027 (refd)
Co-Operative Central Bank Ltd (In Receivership) v Feyen Development Sdn Bhd [1997] 2 MLJ 829 (refd)
Goverment of Malaysia v Lim Kit Siang [1988] 2 MLJ 12 (refd)
Inland Revenue Commissioners v Australian Mutual Provident Society [1947] AC 605 (refd)
M&J Frozen Foods Sdn Bhd v Siland Sdn Bhd [1994] 1 MLJ 294 (folld)
Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp [1979] Ch 384 (refd)
New York Life Insurance Co v Styles 14 App Cas 381 (refd)
Ong Chat Pang & Anor v Valiappa Chettiar [1971] 1 MLJ 224 (refd)
Ostime v Australian Mutual Provident Society [1960] AC 459 (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465 (refd)
Teh Bee v K Maruthamuthu [1977] 2 MLJ 7 (refd)
Young v Bristol Aeroplane Co Ltd [1944] KB 718; [1946] AC 163 (refd)

Legislation referred to

National Land Code 1965 ss 5, 340(1), (2), (b), (3), (a)

Appeal from: Civil Suit No 22–155 of 1992 (High Court, Shah Alam)

Jadadish Chandra (Arbain & Co) for the appellant.
R Devadason (Devadason & Devadason) for the respondents.

Gopal Sri Ram JCA (delivering majority judgment):

[1] The respondents are the children of Retnasamy Naina ('the deceased) by his second wife. The appellant was the third defendant in the court below. There were three other defendants before the High Court but they are not appealing against the orders made by the learned judge. The third defendant purchased the land held under EMR 6693 for Lot No 5079 in the Mukim of Kapar ('the subject land') from one Supia, the deceased's son by his first wife and the first defendant in the court below. The learned judge found that the subject land was trust property, that the first defendant had obtained the issue document of title from the 1st respondent, that the first defendant had no interest in the subject land and that the appellant was not a bona fide purchaser. He accordingly granted the respondents a declaration that the transfer to the appellant was null and void, set aside the transfer and made other consequential orders.

[2] The learned judge's finding that since the first defendant had no interest in the land he was incapable of passing any to the appellant is, in my judgment a correct direction of law. It finds support from the decision of the Supreme Court in *M&J Frozen Foods Sdn Bhd v Siland Sdn Bhd* [1994] 1 MLJ 294. There is a passage in the judgment of Wan Yahya SCJ in that case which is directly applicable to the present appeal:

> A purchaser of land might fail to obtain a good title in two distinct ways. Firstly, if the title of the vendor is bad. Secondly, even if the vendor has a good title, there might be some invalidating defects in the conveyance or transaction in which the purchaser attempted to obtain the title. These transactions might be void or voidable for a variety of reasons. In the case of a defect in the vendor's title, the common law rule, is that no person can give a better title than he had — *nemo dat quod non habet*. There are, however, important exceptions to this rule, in particular the qualification made under the proviso to s 340(3) of our National Land Code 1965 where a *bona fide* purchaser for value without notice of the defeasible nature of the vendor's title acquires an immediate indefeasible title. In the case where the vendor's title is good but the instrument which was used by a purchaser for registration is void or voidable, *the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility* — see *Gibbs v Messer* [1891] AC 248. Under this principle, the registration of the insufficient or void instrument can be set aside. (Emphasis added.)

[3] Applying the *nemo dat* rule, the first defendant had nothing and could therefore pass nothing to the appellant. The appellant may have obtained good title if he had been a *bona fide* purchaser of the subject land. But he was found — and in my view, correctly found — by the learned judge not to be a bona fide purchaser. So, as a matter of law, the learned judge was right in setting aside the transfer to the appellant.

[4] I have used the expression 'may' advisedly because, in my judgment, it is important to appreciate the circumstances to which the proviso to s 340(3) of the National Land Code 1965 ('the Code') applies. For that purpose it is best that I set out the whole of section 340. It reads as follows:

340

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent:

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

[5] There are some observations I would make of this provision. First, the section only comes into play when the title of a registered proprietor is challenged in an action brought for that purpose. It is at that point in time that the court must determine whether — to quote s 340(1) — 'the title or interest of any person or body for the time being registered as proprietor of any land' is indefeasible. If there is no challenge as to title then, of course, the shield of indefeasibility protects the registered proprietor. See *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7.

[6] Second, a plaintiff who challenges the title of the registered proprietor must, in order to succeed, bring his case within one or more of the three sub-paragraphs of s 340(2). Once he does that, the registered proprietor's title will be defeated.

[7] Third, the section uses two the distinct expressions 'proprietor' and 'purchaser'. These are separately defined by s 5 of the Code as follows:

> 'proprietor' means any person or body for the time being registered as the proprietor of any alienated land;
>
> 'purchaser' means a person or body who in good faith and for valuable consideration acquires title to, or any interest in land.

[8] Hence, the 'proprietor' in s 340(1) is not the same person as the 'purchaser' in the proviso to s 340(3).

[9] Fourth, by virtue of s 340(3)(a), once the title of a registered proprietor is rendered defeasible on any of the grounds appearing in s 340(2), it is liable to be set aside in the hands of all subsequent transferees. Further, by virtue of s 340(3)(b), if the proprietor whose title is defeasible grants an interest, for example, a lease, that interest may also be set aside.

[10] Fifth, to the wide reaching power to set aside subsequent dealings with the title by a proprietor whose title is defeasible one exception is stipulated. A *bona fide* purchaser for value of the land from a proprietor with a defeasible title is protected. That is the effect of the proviso to s 340(3).

[11] So, in my judgment, s 340 should be read as follows. The title of a registered proprietor is indefeasible and good against the whole world. But it is not indefeasible in cases where it has been obtained by fraud, forgery, by means of an insufficient or void instrument, or by the exercise of a power purportedly conferred by written law. If a title is acquired by any of these means, then the title of the acquirer is liable to be set aside in the hands of the acquirer and all those to whom he transfers the land except a *bona fide* purchaser for valuable consideration. However, the fact that the title of a registered proprietor is indefeasible does not prevent the land from being forfeited or sold under a statutory power. Neither does it prevent the title being defeated by operation of law.

[12] It is on this basis that Wan Yahya SCJ held, in *M&J Frozen Foods Sdn Bhd v Siland Sdn Bhd*, citing *Gibbs v Messer* as authority, that an acquirer who obtains his title by means of a void or voidable instrument obtains deferred indefeasibility. Accordingly, where title is acquired by means of a forged instrument of transfer, the title of the acquirer may be set aside in his hands even if he is a bona fide purchaser. However, the Federal Court in *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241, reversing this court (whose judgment is reported in [1997] 2 MLJ 62) held that s 340 of the Code admitted of immediate as opposed to deferred indefeasibility. Eusoff Chin CJ said:

> It is a cardinal rule of interpretation that a proviso to a particular section or provision of a statute only embraces the field which is covered by the main provision. The object of a proviso is to qualify or limit something which has gone before it. Its proper function is to except and deal with a case which would otherwise fall within the general language of the main provision of the statute, and its effect is confined to that case. In other words, the object of a proviso is to carve out from the substantive section or clause of a statute, a class or category of persons or things to whom or to which the main section does not apply. The proviso cannot be divorced from the main clause to which it is attached. It must be considered together with the section or subsection of the statute to which it stands as a proviso.
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> The proviso to sub-s (3) of s 340 of the NLC deals with only one class or category of registered proprietors for the time being. It excludes from the main provision of sub-s (3) this category of registered proprietors so that these proprietors are not caught by the main provision of this subsection. Who are these proprietors? The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provision of sub-s (3). *For this category of registered proprietors, they obtained immediate indefeasibility notwithstanding that they acquired their titles under a forged document*.
>
> We therefore, agree with the High Court Judge that, on the facts of this case, even if the instrument of transfer was forged, the respondent nevertheless obtained an indefeasible title to the said lands. (Emphasis added.)

[13] It can be seen at once that the Federal Court equated a 'proprietor' with a 'purchaser'. In doing so it overlooked s 5 of the Code that provides separate definitions of these two words indicating in clear terms that they are different statutory concepts. It also overlooked the decision of the Supreme Court in *M & J Frozen Foods*. Accordingly, I am of the very respectful view that the decision of the Federal Court is *per incuriam* and not good law.

[14] In *Goverment of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, Abdul Hamid CJ (Malaya) quoted with approval the following passage in the judgment of the English Court of Appeal in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718; [1946] AC 163 at p 729:

> Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, *but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different*. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam. We do not think that it would be right to say that there may not be other cases of decisions given per incuriam in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts. (Emphasis added.)

[15] *Young v Bristol Aeroplane Co Ltd* is also authority for the proposition that there are conflicting decisions of the Court of Appeal, this court is free to

choose which it will follow. Further, in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384 Oliver J (later Lord Oliver of Aylmerton) suggested that where there are conflicting decisions of the Court of Appeal, a High Court is free to choose which decision to follow.

[16] I accept that the observations in *Young v Bristol Aeroplane Co Ltd* refer to the Court of Appeal. But I see no difference in principle in relation to this Court and the Federal Court. If it is demonstrated to a conviction that a decision of the Federal Court was arrived at — to borrow the words from *Young v Bristol Aeroplane Co Ltd* — 'in ignorance of the terms of a statute' are we nevertheless to apply it? I do not think so. In support I cite the following passage from the well respected work '*Jurisprudence*' by Professor Dias (1985):

> If the reasoning behind a decision is shown to have been faulty by a higher court, or even by a court of co-ordinate authority, that decision may again be disregarded.

[17] In *Ostime v Australian Mutual Provident Society* [1960] AC 459, the House of Lords had to consider its decision in *Inland Revenue Commissioners v Australian Mutual Provident Society* [1947] AC 605 which had been decided without reference to the earlier decision of the House in *New York Life Insurance Co v Styles* 14 App Cas 381 Lord Denning said:

> *And, as it happened, no doubt owing to the unusual course which was adopted, the House in 1947 was never referred to a very relevant decision of its own. It was never referred to the decision in New York Life Insurance Co v Styles, which holds that a mutual life assurance society does not make profits. … My Lords, I ask myself, What authority is to be given in these circumstances to the decision of this House in 1947? Is it to be followed from step to step regardless of consequences? Are we to hold that the tax under r 3 is a tax on the profits of the business for all purposes, including the purposes of the Double Taxation Agreement, which this House never had in mind at all? I think not. The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff. As soon as you find that you are going in the wrong direction, you must at least be permitted to strike off in the right direction, even if you are not allowed to retrace your steps. And that is what I would ask your Lordships to do.* (Emphasis added.)

[18] So too here. It is plain that the Federal Court in the *Adorna Properties* case did not have regard to the earlier decision of the Supreme Court in *M & J Frozen Foods*. Worse, it did not have regard to s 5 of the Code. I do not think that I should fall off the proverbial cliff. I think that I must strike out in the right direction.

[19] I take this view because the consequences of the judgment in *Adorna Properties* are startling. As a registered proprietor you can cling on to your issue document of title for dear life. Yet a rogue may by the use of forged documents obtain a duplicate of the issue document of title claiming the original to be lost and sell and transfer your land to a perfectly innocent purchaser. That is what happened in the *Boonsom Boonyanit* case. Yet, according to the judgment of the Federal Court, you cannot recover your property. The problem has arisen because, as I have already said, the Federal Court ignored the definition

of 'proprietor' and 'purchaser' in s 5 of the Code and also did not have regard to the *M & J Frozen Foods* case. If the Federal Court had hearkened to written law and to precedent, the steps of logical reasoning would have been as follows.

[20] Pursuant to s 340(1) of the Code, Adorna Properties was the proprietor 'for the time being registered', that is to say, at the date on which Boonsom Boonyanit claimed title to the land as true owner. At that point in time Adorna Properties had obtained its title under a forged instrument. About that there was do doubt. Accordingly, *Adorna*'s case fell within s 340(2)(b) of the Code because 'registration was obtained by forgery, or by means of an insufficient or void instrument'. Therefore Adorna's title was defeasible. Put shortly, Adorna was the registered proprietor under s 340(1) and not a purchaser within the proviso to s 340(3).

[21] By contrast, if Adorna had later sold and transferred the land to a third party, X, then s 340(2)(b) would not be applicable because the transfer would not be a forgery. X's title would be protected by the proviso to s 340(3) if X paid value and acquired the land without notice of the forged transfer in Adorna's favour. This points to deferred and not to immediate indefeasibility.

[22] Accordingly, in my judgment our courts should no longer treat themselves bound by the Federal Court judgment in *Adorna Properties Sdn Bhd v Boonsom Boonyanit* as it was decided per incuriam. It follows that this court and the High Courts must now proceed on the basis that the Code provides for deferred and not immediate indefeasibility.

[23] In the present case, the learned judge found the appellant not to be a witness of truth and rejected his evidence. It is on that basis that he held the appellant not to be a bona fide purchaser of the subject land. The burden of establishing that he was a bona fide purchaser for value lay on the appellant: See *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465; *Ong Chat Pang & Anor v Valiappa Chettiar* [1971] 1 MLJ 224. The finding of the court below that the appellant was not a bona fide purchaser is one of pure fact based on the credibility of witnesses. In accordance with the well settled practice of this court I will not interfere with such a finding.

[24] For the reasons already given, I was compelled to the conclusion that this appeal is devoid of merit. It was dismissed without calling upon learned counsel for the respondent. Orders were made that are usually consequent upon a dismissal.

Ahmad Fairuz HMR:

[25] Saya telah membaca draf alasan penghakiman Gopal Sri Ram HMR dan saya bersetuju dengan penghakiman itu kecuali setakat mana penghakiman itu menyatakan bahawa keputusan Mahkamah Persekutuan di dalam kes *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241 ('Adorna Properties')

adalah *per incuriam* dan oleh itu mahkamah-mahkamah tidak perlu lagi menganggap mereka terikat dengan keputusan itu.

[26] Berasaskan prinsip duluan kehakiman mengikat (judicial precedent), saya berpendapat mahkamah ini tidak mempunyai pilihan kecuali menerima dan mematuhi keputusan Mahkamah Persekutuan di dalam kes *Adorna Properties*. Edgar Joseph Jr HMP di dalam kes *Co-Operative Central Bank Ltd (In Receivership) v Feyen Development Sdn Bhd* [1997] 2 MLJ 829 berkata:

> The question therefore arises: is it open to an intermediate court of appeal, such as the Court of Appeal in this country, to disregard a judgment of a final court of appeal such as the Federal Court on the ground that it was given *per incuriam*?
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> Our task in answering this question has been made considerably easier by the assistance derived from the remarks of Lord Hailsham in *Cassell & Co Ltd v Broome & Anor* [1972] AC 1027, which indicated the reaction of the House of Lords to the Court of Appeal's refusal to follow a previous decision of the House on the ground that it was made *per incuriam*.
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> Touching on the repercussions of the Court of Appeal advising judges of first instance to ignore decisions of the House of Lords, Lord Hailsham said this (at p1954B–D):
>
> > I am driven to the conclusion that when the Court of Appeal described the decision in *Rookes v Barnard* as decided *'per incuriam'* or 'unworkable', they really only meant that they did not agree with it. But, in my view, even if this were not so, it is not open to the Court of Appeal to give gratuitous advice to the judges of first instance to ignore decisions of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable. The course taken would have put judges of first instance in an embarrassing position, as driving them to take sides in an unedifying dispute between the Court of Appeal or three members of it (for there is no guarantee that other Lord Justices would have followed them and no particular reason why they should) and the House of Lords. But much worse than this, litigants would not have known where they stood. None could have reached finality short of the House of Lords and in the meantime, the task of their advisers of advising them either as to their rights, or as to the probable cost of obtaining or defending them would have been, quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection.
>
> And in a famous passage (at p 1054 D–E), Lord Hailsham concluded this part of the case by saying:
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> > The fact is, and I hope that it will never be necessary to say so again, that in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v Bristol Aeroplane Co Ltd* [1944] 1 KB 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom.

> In our view, every word of what Lord Hailsham said regarding the status of judgments and relevance of precedent in the House of Lords, the circumstances, the duty of the Court of Appeal to accept loyally the decisions of the House of Lords and the chaotic consequences which would follow should the Court of Appeal fail in this duty apply with full force, *mutatis mutandis*, to this country and we adopt what his Lordship said. Clearly the Court of Appeal in *Harta Empat* [1997] 1 MLJ 381 flew in the face of the principles enunciated by Lord Hailsham and we can only express the hope that it will not be necessary for the Federal Court hereafter to have to remind the Court of Appeal of those principles.

[27] Ketara ungkapan penghakiman yang dipetik di atas mengandungi prinsip-prinsip dan hujjah-hujjah yang munasabah. Justeru itu, saya berpendapat semua mahkamah yang bidang kuasanya lebih rendah dari Mahkamah Persekutuan hendaklah mematuhi kes itu sehingga ianya ditolak atau digantikan dengan kes perundangan yang lain dari Mahkamah Persekutuan.

[28] Di dalam kes ini hakim perbicaraan telah membuat penemuan fakta bahawa perayu bukanlah seorang saksi yang bercakap benar dan atas asas itu beliau telah memutuskan bahawa perayu bukanlah pembeli bona fide tanah yang menjadi pertikaian. Justeru itu, saya menolak rayuan ini dengan kos.

Appeal dismissed.

Reported by Peter Ling